

# Karl Polanyi and the problem of corporate social responsibility

LILIAN MONCRIEFF\*

*This article considers Corporate Social Responsibility (CSR) as part of the projects in 'new governance' and 'de-centered regulation,' which draw social forces towards the regulation of economic behaviour. It uses Karl Polanyi to open up pertinent interfaces between society and economy for observation, and Gunther Teubner to substantiate a 'regulatory' view of the company's social relationships. The article finds that CSR combines movements for the recognition of social relationships, on an unprecedented scale, with rigorous simultaneous movements for market building and social abstraction. Twenty-first century market economy is defined by a capacity to contain 'the social,' which is thrown between the two movements, creating opportunities for companies to void the market's social limits. The article counterposes that the social that 'returns' after marketisation needs to find its way past market building CSR, to constructively unshackle and redefine the framing of social conflicts that concern markets and the corporation.*

## INTRODUCTION

The place of social relations in the economy is a question that has long transfixed social theorists, and never more so than in contemporary global economy. The presentation of social relations as a given complexity, or a fundamental creative source from which economic behaviour is always constituted, is the 'other' to economic theory's tendency towards neutrality, abstraction and rational self-sufficiency.<sup>1</sup> Social movements that speak to (shared, differential) lived experiences of the global economy, and which comment on patterns of inequality and exclusion, precarity and indebtedness, attest to the simultaneous vulnerability and tenacity of this 'other.'<sup>2</sup> Social questions filter through, and partly coagulate, in institutional avenues such as corporate social responsibility, responsible investment and

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\* School of Law, Stair Building, University of Glasgow, G12 8QQ  
[lilian.moncrieff@glasgow.ac.uk](mailto:lilian.moncrieff@glasgow.ac.uk)

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<sup>1</sup> M. Granovetter, 'Economic action and social structure: the problem of embeddedness' (1985) 91 *American J. of Sociology* 481-510.

<sup>2</sup> M. Burawoy, 'Facing an unequal world' (2015) 63 *Current Sociology* 5-34.

consumption, the greening of economic behaviour, business and human rights. At the other end of the spectrum, the long shadows cast by figures regularly subject to intensification in the economic sphere – environment, workers, debtors – represent a social domain that is difficult to completely eradicate, even at the most abstract levels of economic exchange. The insistent ‘return’ after marketisation, of environmental limits or the ‘N.I.N.J.A.’ borrower, say, testifies to a continuing (or surviving) vitality of the social and material relationships engaged, in any era, by the market sphere.<sup>3</sup>

This article considers the concept and practice of Corporate Social Responsibility (CSR) within this project to understand the role and influence of social relations on economic behaviour. It experiences, in CSR, a confluence and institutionalisation of the social question in respect of twenty-first century global economy and, more specifically, the market participation of its primary actors, the (multi- or transnational) corporations. The article identifies, in the rise of CSR, an exposition of the value of social and environmental constituents to market activities, which is communicated by representatives of ‘the wider interests’ to the enterprise actor.<sup>4</sup> This elaboration emerges alongside, or after, an entanglement of social and environmental factors with business practices, which flow from the organising principles of liberal markets concerning rational choice, self-interest and the pursuit of gain. Contesting or complicating abstractions in the market, which concern social and environmental constituents, CSR mobilisations advance a mix of instrumental and normative arguments for socially protective accommodations within the market. CSR’s crucial efforts in responsabilisation rely on, and work with, a capacity for social influence, which is installed within the economy. CSR draws on the participation of the wider interests and works with their normative aspirations, or (de-centered) attempts at defining social standards and purposes, to ‘regulate’ the corporation’s pecuniary interests. Working, in legal terms, with non-state regulatory spheres and plural norm-creation activities, in this way, are strategic components of the legal techniques associated with ‘de-centered regulation’ and ‘new governance.’<sup>5</sup>

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<sup>3</sup> The acronym ‘N.I.N.J.A.’ refers to the ‘No Income, No Job or Assets’ sub-prime borrower of the 2008 crisis.

<sup>4</sup> The term ‘wider interests’ is used to reference social, environmental and community stakeholders, using ‘wider’ in the sense of the UK Company Law Review 1998-2001 and its consideration of CSR. Company Law Steering Group, *Modern Law for a Competitive Economy: the strategic framework* (1999) Ch. 5.

<sup>5</sup> O. Lobel, ‘New governance as regulatory governance’ in *The Oxford Handbook of Governance*, ed. D. Levi-Faur, (2012) 65; C. Scott, ‘Regulation in the age of governance: the rise of the post regulatory state,’ in J. Jordana and D. Levi-Faur (eds.) *The Politics of Regulation: Institutions and Regulatory Reforms for the Age of Governance* (2004) 145-174; J. Black, ‘Decentering regulation: understanding the role of regulation and self-regulation in a “post-regulatory” world,’ (2001) 54 *Current Legal Problems*, 103-146.

This view of CSR is interesting, and deserving of academic inquiry, because it seems to suggest the 'becoming,' or 'the truth of,' the social in the twenty-first century economy. Confirmation, via the popular movement for CSR, of a social presence in economic behaviour has been effective in supporting the rise of a multitude of new institutional channels, instruments and mobilisations for the promotion and security of social influence over corporate behaviour. The channels include the development of soft-law instruments and the social capturing of consumer and investor activities by businesses. It concerns the involvement of state, market, community, local, regional and global networks in the development of a cognitive infrastructure for improving the social value and legitimacy of calculative acts. The aim of this article is to study the quality and strength of these strategies. What is the influence, it asks, of the wider constituents on corporate practices when they use the instruments and institutional links made available to them by CSR and new governance? Can the practice of CSR secure the social understandings produced within its folds? Does CSR draw from social actors a 'limitative' or 'regulatory' force, or even – to employ the much-contested term – the potential for 'embeddedness'? This article investigates these questions concerning the power and place of the social relations in economic regulation and governance. It studies the communication of social values, via the apparatus of CSR, and the influence of the relevant channels of communication on the behaviour of corporate actors.

The article combines social theory and law in its analytical enquiries. It brings, to the study of CSR, the social history and theory of Karl Polanyi, focusing particularly on his work in *The Great Transformation*.<sup>6</sup> There has been a veritable explosion of interest in Polanyi's work in recent years across a multitude of varied disciplines.<sup>7</sup> His work presents a rich, historical, theorisation of the crisis dynamics and potential for social injustice, which accompany the spread of economic liberalism. This presentation has struck a chord with those 'united in their apathy' to the contemporary neoliberal turn, and with efforts to improve understanding and institute recovery after the recent spate of economic, financial and sovereign debt crises.<sup>8</sup> Part of this work has brought Polanyi to the study of CSR and corporate governance. This work, concerning CSR, tends to focus on the capacity of Polanyi's 'double-movement' to carry a collective and transnational social movement for protection and responsibility *against* neoliberal forces

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<sup>6</sup> K. Polanyi, *The Great Transformation* (2001/1944).

<sup>7</sup> Relevant journal collections for this article include: *Special Issue: New Directions in Polanyian scholarship* (2014) 43 *Economy and Society*; D. Ashiagbor, P. Kotiswaran and A. Perry-Kessaris (eds.), *Special Issue: Towards an Economic Sociology of Law* (2013) 40 *J. of Law and Society* and (2014) *Northern Ireland Legal Q.* and also G. Krippner *et al*, 'Polanyi symposium: a conversation on embeddedness' (2004) 2 *Socio-Economic Rev.* 109.

<sup>8</sup> G. Dale, *Karl Polanyi: the limits of the market* (2010) at 207.

for marketisation.<sup>9</sup> This article seeks to review and reconsider this prospect in relation to CSR, using Polanyi's theory to open up the important interfaces between society and economy. In particular, Polanyi allows the article to reflect on *how* the social question arises, today, in the market formally defined in terms of its spontaneous capacities. The article conceptualises the gaps in responsibility, which are indicated by a counter-movement for CSR, as the social under-side of a market economy's 'disembedding' calamities. It then, broadly speaking, reviews the ability of CSR to carry social influence to the company and to perform meaningful 'interventions' in respect of any such calamity.

Since the 1980s, comparable efforts to 'disturb the social and moral neutrality' of market methods, and recover and emancipate the social in the economy, have given rise to nothing less than a 'sociological invasion of the market.'<sup>10</sup> Scholarship associated with the 'new economic sociology' has significantly broadened empirical and analytical understandings of the social structuring of economic phenomena.<sup>11</sup> This article shares a determination with economic sociology to explore the interplay between economic and non-economic phenomena, and, in this particular case, to capture this interplay in the context of corporate governance. However, it also differs from this body of work where it employs legal fields and frameworks, rather than corporate action or social participation, as its key empirical front. In particular, the article studies the pattern of market interactions hosted by CSR in terms of the *cognition and*

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<sup>9</sup> G. Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalisation* (2012) at 8; G. Teubner, 'Self-Constitutionalizing TNCs? On the Linkage of "Private" and "Public" Corporate Codes of Conduct' (2011) 18 *Indiana J. of Global Legal Studies* 617-638; M. Amstutz, 'Globalising Speenhamland: the transnational metamorphosis of corporate social responsibility' and P. Zumbansen, 'The next "great transformation"? The double movement in transnational corporate governance and capital markets regulation,' both in *Karl Polanyi: Globalisation and the Potential of Law in Transnational Markets*, eds. C. Joerges and J. Falke (2011) 359 and 181; D. Levy and R. Kaplan, 'CSR and Theories of Global Governance: Strategic Contestation in Global Issue Arenas' in *The Oxford Handbook of CSR*, eds. A. Crane et al. (2007) at 443-444; M. Caporale Madi and J. Goncalves, 'Corporate Social Responsibility and market society: credit and banking inclusion in Brazil' in *Reading Karl Polanyi for the Twenty-first Century*, eds. A. Buğra and K. Ağartan (2007), 235.

<sup>10</sup> V. Zelizer, 'Beyond the polemics on the market: establishing a theoretical and empirical agenda' (1988) 3 *Sociological Forum* 614-634 at 617.

<sup>11</sup> The new economic sociology (NES) 'manifesto,' Granovetter, op. cit., n1; R. Swedberg, 'New economic sociology: what has been accomplished? What lies ahead?' (1997) 40 *Acta Sociologica* 161-182; drawing NES together with the 'social' presented in the 'new materialism' of Science and Technology Studies (STS) and also the 'new institutionalists,' J. Black, 'Reconceiving financial markets: from the economic to the social' (2013) 13 *Journal of Corporate Law* 401-442.

*reflexivity* concerning social interests that is instituted by company law and legal structures.<sup>12</sup> It explores the cognitive possibilities for addressing and adequately reflecting upon the market's 'messy socialities,' which are admitted by the institutional confines of CSR and generated by the law's constructions of the company's 'social' personality. This focus distinguishes the work carried out in the present article from wider empirical studies of the 'good will' or 'conscientious intentions' of multinational corporations to engage with social and environmental issues, or the number and vitality of social actors engaged by CSR and the task of social regulation. The article endeavours not to gather information on this will or social power directly. It seeks, rather, to add significantly to their mutual comprehension by using theory to study what of willingness and vitality the law surrounding CSR admits.

Determining the legal boundaries of reflexive responsiveness, in this way, takes the article on a journey deep into the structural possibilities of new governance and de-centered regulation. The article uses the work of systems theorist, Gunther Teubner, on legal pluralism and constitutionalism to substantiate this journey – to put forward a compelling case. It studies the increasing exposure of the corporation to the 'irritations' or 'constitutional impulses' of a social body that is engaged by, and creates a network of communications on, corporate responsibility. By studying the company's learning process, in response to these pressures, the article uncovers a structural tendency in CSR to contain the social and environmental relationships, which are engaged by the corporation in acts of 'responsiveness.' The social is forced into a deep and (often) invisible split, as a result, with some parts being swept away in the spread of social abstraction that follows. The objective is to explore the nature of this containment and fracture, and explain why it remains unaddressed by scenes moved for and by pluralisation in CSR. The article argues, in a critical vein, that the rise of the social relationships in CSR guarantees nothing – and certainly not 'embeddedness' – unless its creative force is able to find a way past market-building CSR.

#### CORPORATE SOCIAL RESPONSIBILITY: A NARRATIVE ABOUT 'RESPONSIBILITY'

CSR is a broadly heterogeneous concept, which brings together a wide range of different discourses, bodies and practices concerning the corporation and its social and environmental impacts. It presents, from one perspective, as a site of struggle and communication for the non-economic interests, which are

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<sup>12</sup> Working alongside scholars in the economic sociology of law to define agendas and noting R. Birla, 'Maine (and Weber) against the grain: towards a postcolonial genealogy of the corporate person' (2013) 40 *J. of Law and Society* 92-114 at 93-96, exploring the 'dynamic social text of law' in economy and finding 'critical impetus.'

globally affected by market activities.<sup>13</sup> Labour interests and activists, suppliers, customers, community and environmental stakeholders, use the discourses made available to them by CSR to voice claims and (also) to create instruments for the regulation of corporate behaviour according to certain standards or principles.<sup>14</sup> The range of this discourse ranges from human rights initiatives and stakeholder lobbying or protest, to 'individualised collective action' in the market sphere, for example in responsible investment and consumption.<sup>15</sup> CSR, from another view, refers to a set of practices for the management of the social and environmental impact generated by the market participation of corporate actors, which is instituted at the level of the enterprise itself.<sup>16</sup> The practice of CSR works with the self-governance capacities of the corporation, and its capacity to 'learn' about the social relationships from actors working at the site of the struggle.<sup>17</sup> Guidance and soft-law instruments, as well as wider market indications, serve as a basis for progressing this exchange and for consolidating the influence of the dispersed social actors, policy makers and bodies engaged by CSR. The defining feature of this double view of CSR, which stretches across multiple and overlapping legal systems, is the work that it does to draw the attention of the company's directors *outwards*, for the recognition of social relationships. CSR invites regard for a horizon of values beyond the figure of the shareholder. It sensitises directors to knowledge generated by wider constituents on the subject of society and environment, and uses existing governance processes to foster responsiveness.

Recent consideration of the interface between CSR and law has sought to qualify the emphasis on self-governance in the concept, and all the antinomy that one might thereby anticipate, with an illumination of

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<sup>13</sup> S. Soule, *Contention and Corporate Social Responsibility* (2009).

<sup>14</sup> S. Poret, 'Corporate-NGO Partnerships in CSR activities: why and how?' (2014) 21 *Cahier de recherche* <hal-01070474>; F. Palpacuer, 'Challenging governance in global commodity chains: the case of transnational activist campaigns for better work conditions,' in *Corporate Social Responsibility and Regulatory Governance*, eds. P. Utting and J. Marques (2009), 276; J. Moon and D. Vogel, 'Corporate social responsibility, government and civil society' in *Oxford Handbook on CSR*, n9.

<sup>15</sup> M. Micheletti, *Political Virtue and Shopping* (2010).

<sup>16</sup> J. Parkinson, *Corporate Power and Responsibility* (1995) Ch. 9 and Ch. 10; O. de Schutter, 'Corporate Social Responsibility European Style' (2008) 14 *European Law J.* 203-236; C. Scott, 'Reflexive governance, meta-regulation and corporate social responsibility: the "Heineken" Effect,' in *Perspectives on Corporate Social Responsibility*, eds. Nina Boeger *et al* (2008) 170-186.

<sup>17</sup> Amstutz, *op. cit.*, n9, pp. 382-385; Teubner, *op. cit.* (2012), n9, pp. 83-86 and (2011), n9; P. Zumbansen, 'The Conundrum of Corporate Social Responsibility: Reflections on the Changing Nature of Firms and States' in *Transboundary Harm in International Law*, eds. R. Bratspies and R. Miller (2006) 240; L. Backer, 'Economic Globalisation and the rise of efficient systems of global private law making: Wal-mart as global legislator' (2007) 39 *Connecticut Law Rev.* 1-46.

the extent to which CSR is entwined with the work of law and institutions.<sup>18</sup> This link emphasises the need for cultivating a 'third way' between traditional command and control regulatory strategies and de-regulation.<sup>19</sup> A starting point concerns the 'embedding' of the company 'in a complex field of historically grown, institutionally and legally structured frameworks.'<sup>20</sup> Institutional work carried out in company and securities law, for example, enacts dynamic parts of 'the process' of CSR. The UK Companies Act 2006 ('the 2006 Act') requires directors to 'have regard' to a list of non-economic factors when promoting the success of the company for the benefit of members as a whole.<sup>21</sup> Complementary work to foster a more reflective mode of decision-making is also found in the drive for corporate transparency and regulation of non-financial narrative reporting.<sup>22</sup> Links with state and supranational law, to this effect, provide institutional gateways for growing the practice of CSR, and for supporting the development of a network of communications on CSR subjects.<sup>23</sup> This same network of CSR instruments has also, itself, come under scrutiny as a source of legal communication and restraint. The corporation rests, today, at the centre of complex and emerging governance systems, which break with the unity of state, law and territory. 'Transnational' or 'global' in character, the systems relate 'public' communicative networks and standard setting activities undertaken by groups of states, civil society actors and institutional organisations, to 'private' governance systems, which concern the development of CSR policies and procedures, standards and dialogue at the level of the corporation.<sup>24</sup> The result is a regulatory system that is 'de-centered' from the state and 'polycentric' in its creation of 'law,' or applicable rules of conduct

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<sup>18</sup> D. McBarnet, 'Corporate social responsibility beyond law, through law, for law: the new corporate accountability,' in *The New Corporate Accountability: Corporate Social Responsibility and the Law*, eds. D. McBarnet et al (2007) 9-58.

<sup>19</sup> Lobel, op. cit., n5, Part II; C. Parker, *The Open Corporation: Effective self-regulation and democracy* (2002).

<sup>20</sup> Zumbansen, op cit., n9, p.196.

<sup>21</sup> Companies Act 2006, s172 (1) (a) to (f). A non-exhaustive list includes the interests of employees, suppliers, customers and others, reputation and the company's impact on community and environment. A. Keay, 'Section 172(1) of the Companies Act 2006: an interpretation and assessment' (2007) 28 *Company Lawyer* 106-109.

<sup>22</sup> UK: Companies Act 2006, ss414A-D concerning the requirements for the 'strategic report;' Companies Act 2006 (Strategic Report and Directors Report) Regulations 2013; Council Directive 2014/95/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups OJ/2014/L330/1 ('the Disclosure Directive'); Global Reporting Initiative (GRI) <<http://www.globalreporting.org>> and the International Integrated Reporting Framework (IIRC) <<http://www.theiirc.org/international-ir-framework>>.

<sup>23</sup> The conversation on CSR's 'links with law' extends to include instances of delict/tort, human rights, advertising law, public procurement, shareholder activism, public procurement and global governance, see summaries in de Schutter, op. cit., n16, pp. 227-235; McBarnet, op. cit., n18.

<sup>24</sup> Amstutz, op. cit., n9 above, pp. 376-393; Teubner, op. cit. (2011), n9; P. Zumbansen, "New Governance" in *European Corporate Law Regulation as Transnational Legal Pluralism* (2009) 15 *European Law J.* 246-276

in respect of society and environment.<sup>25</sup>

It is useful to introduce an important distinction, at this point, in setting up the course of this article. This distinction concerns the overall frame for social reference, which is employed by the institutions of CSR, including section 172 of the 2006 Act and narrative reporting in the UK, as well as global 'private' regulation. 'Annual reporting is designed to provide the information shareholders need to understand how the companies they invest in are being run,' said the UK Department of Business, Information and Skills (BIS) in 2012.<sup>26</sup> The original, and still primary, purpose of a flow of information from the company to the wider public, in domestic and global legal systems, is to fulfill the interests and needs of the corporation's *market allies, consumers and investors*. An increasingly important part of this information, of course, concerns the appreciation of social and environmental risks. The 2014 EU Directive on the disclosure of non-financial and diversity information intimates this clearly, for example, requiring, for certain undertakings and groups, reporting on environmental matters, social and employee-related matters, respect for human rights, anti-corruption, bribery matters and diversity.<sup>27</sup> Yet, the requirements for wider social and environmental disclosure are also cast, in European CSR, against fundamental rights, including 'the freedom to run a business' and the dedication to 'increasing investor and consumer trust.'<sup>28</sup> International initiatives, similarly, create frameworks within which the company is encouraged to apply metrics and measurements to 'explain' how all (including social) resources are 'creating value.'<sup>29</sup> Information provided by the company, which reaches a wider range of stakeholders, still bears the mark of this dominant *economic* purpose, which is linked in policy terms to the company's efficient agency.<sup>30</sup> Social litigation and responsible ownership may emerge within the markets created in social and environmental risk. But, they emerge within an information management process, which broadly works

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<sup>25</sup> G. Teubner, 'Global Bukowina: legal pluralism in the world society,' in *Global Law Without a State: Studies in modern law and policy*, ed. G. Teubner (1997) 3-31.

<sup>26</sup> Department for Business, Information and Skills, *The future of narrative reporting* (2012) at 3.

<sup>27</sup> Disclosure Directive, op. cit., n22, paragraphs 6, 18 and 19.

<sup>28</sup> European Parliament Resolution on Corporate Social Responsibility: accountable, transparent and responsible business behaviour and sustainable growth, 2012/2098 (INI) at paragraph 6; see also European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a Renewed EU Strategy 2011-14 for Corporate Social Responsibility' COM/2011/681 final at 3.43.3 'addressing CSR is in the competitive interests of business.'

<sup>29</sup> International Integrated Reporting Framework (IIRC), op. cit., n22, home page.

<sup>30</sup> P. Ireland, 'Financialisation and Corporate Governance' (2009) 60 *Northern Ireland Legal Q.* 1-34; T. Clarke, 'The impact of financialisation on international corporate governance: the role of agency theory and maximising shareholder value' (2014) 8 *Law and Financial Markets Review* 39-51.



with *market disciplines* – hence the emphasis on the role of market allies (consumers, investors), and the responsibility of other stakeholders to regularly ‘translate’ their concerns into economic ones.

This economic lens is entrenched throughout ‘CSR as process.’ CSR stops visibly short of a pluralist or stakeholder approach to corporate purposes and responsibility.<sup>31</sup> The substance of a company’s CSR practice is defined by ‘the voluntary action that business can take, over and above legal requirements to manage and enhance economic, environmental and societal impacts.’<sup>32</sup> In the UK, for example, the requirement to ‘have regard’ to society and environment, when making business decisions, enacts the policy known as ‘enlightened shareholder value’ (ESV). Section 172 of the Companies Act 2006 limits the directors’ glance outwards, for the consideration of social and environmental factors, to a level that is consistent with the promotion of long-term shareholder value (whilst not precluding concerns for shorter term measures of success).<sup>33</sup> The duty to consider invites the director, acting in good faith, to reconcile wider factors with business strategies. This leaves value creation *in charge* of the governance process that is enacted by CSR – connecting ‘enlightenment’ with the demands of a ‘business case for CSR.’<sup>34</sup> Similar limitations are relevant in the case of CSR initiatives in the domain of socially responsible investment (SRI), such as the UN-backed Principles of Responsible Investment.<sup>35</sup> Institutional investors and their investment managers are invited by soft-law instruments to ‘integrate’ social, environmental and governance (ESG) criteria into investment decisions, ‘fostering’ and spreading the development of CSR.<sup>36</sup> Yet, this move for social integration is limited in its invigoration to the bounds of fiduciary duty and the responsibility of investment managers to broadly protect the pecuniary interest of underlying

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<sup>31</sup> A. Keay, ‘Moving Towards to Stakeholderism? Enlightened Shareholder Value, Constituency Statutes and More: Much Ado About Little?’ (2011) 22 *European Business Law Rev.* 1-49; S. F. Copp, ‘s172 Companies Act 2006 Fails People and Planet?’ (2010) 31 *The Company Lawyer* 406 – 408.

<sup>32</sup> Department for Business, Innovation and Skills, *Good for business and society: government response to calls for views on corporate responsibility* (2014) BIS/14/651 at 3.

<sup>33</sup> A. Keay, ‘The duty to promote the success of the company: is it fit for purpose?’ (2011) University of Leeds, at <<http://www.law.leeds.ac.uk/assets/files/research/events/directors-duties/keay-the-duty-to-promote-the-success.pdf>>, at 22-25; A. Alcock, ‘An accidental change to directors duties’ (2009) 30 *Company Lawyer* 362-368

<sup>34</sup> O. Lobel, ‘The Renew Deal: the fall of regulation and the rise of governance in contemporary legal thought’ (2004) 89 *Minnesota Law Rev.* at 264, noting the strength of new governance as its ‘explicit’ suggestion that ‘economic efficiency and democratic legitimacy can be mutually reinforcing;’ de Schutter, *op. cit.*, n16, p.235 noting the priority of the ‘business case’ and the alignment of CSR with the growth focus of the EU Lisbon strategy.

<sup>35</sup> See <<http://www.unpri.org>>.

<sup>36</sup> McBarnet, *op. cit.*, n18, 32-33; R. Sparkes and C. Cowton, ‘The maturing of socially responsible investment: A review of the developing link with CSR’ (2004) 52 *J. of Business Ethics* 45-57.

investors.<sup>37</sup> This knot or bond with gain is important, global policy makers argue, for the overall systematisation and operationalisation of the market economy and for the overall control of company directors' (or investment managers' in the case of SRI) discretion.<sup>38</sup>

Guidance available on the meaning and extent of social consideration, which CSR practices require, is diverse in (all of) origin, author, objectives, areas covered and implementation techniques. This diversity links to a vastly de-centered system of norm production for the project of 'new governance' and the development of 'transnational legal pluralism' in the domain of CSR.<sup>39</sup> The range available includes national, international and regional guidelines ('public codes') on labour practices and human rights, 'private' codes of conduct, self and co-regulation schemes, tools and schemes for social and environmental reporting, certification and labeling initiatives. It includes civic mobilisations and lobbying activities, which politicise firms and their practices, as well as best practice and knowledge exchange activities (henceforth 'CSR mobilisations and instruments').<sup>40</sup> The power of CSR instruments is less in their direct legal influence – indeed, most are effectively non-binding – and more in their capacity to produce a public elaboration of social interests and (increasingly) fundamental human rights impacted upon by economic activities in a juridical setting.<sup>41</sup> The institutionalisation of CSR in provisions such as ESV directs this elaboration of values and rights in such a way as to secure the best possible chance of interacting with a company's existing self-governance mechanisms. It concerns a reflexive process that takes place *within* the company, where directors are mobilised towards the address of social relationships in the act of self-governance, and in an appeal to the evaluated link between CSR and competitive advantage at the micro (firm) or macro (economy) level ('the business case for CSR'). The European Commission relays benefits in terms of the company's cost structure, human resources, customer perspective, innovation, risk and reputational management and financial performance.<sup>42</sup> The UK Government, similarly, relate CSR practices and 'the business case for CSR' to maximisation of

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<sup>37</sup> J. Sandberg, 'Socially Responsible Investment and fiduciary duty: putting the 'Freshfields Report' into perspective' (2011) 101 *J. of Business Ethics* 142-162.

<sup>38</sup> Company Law Steering Group, *Modern Company Law for a Competitive Economy: Completing the Structure* (DTI, London, 2000) at 3.2 to 3.5.

<sup>39</sup> Zumbansen, op. cit., n24.

<sup>40</sup> European Commission, *ABC of the main instruments of Corporate Social Responsibility* (2004).

<sup>41</sup> On the 'interpenetration' or 'co-evolution' of state, 'public' and 'private' governance systems, Amstutz, op. cit., n9, pp. 385-390, Zumbansen, op. cit., n9, 190-195. On human rights, S. Macleod, 'Reconciling regulatory approaches to corporate social responsibility: the European Union, OECD and United Nations compared,' (2007) 13 *European Public Law* 671-702.

<sup>42</sup> European Commission, 'European Competitiveness Report', COM (2008) 774, Ch. 5.

wealth and welfare for all and the longer-term success of the UK economy.<sup>43</sup>

Contemporary enthusiasm for CSR also extends beyond these instrumental arguments. The concept is increasingly cast against the deeper ramifications of globalising markets for law, which concern gaps in the capacity of governmental institutions to regulate markets and transnational business actors. The pluralisation and diversification of normative sources on the subject of social responsibility provides an opportunity to address this void in legal and political authority and, in the words of Gunther Teubner, 'to determine anew the relationship between representation, participation and reflection.'<sup>44</sup> Teubner uses the notion of 'societal constitutionalism' to anchor this legal-political determination, and to 'found' the 'new living law,' which grows out of fragmented and de-territorialised, specialised and functional discourses (or networks), independently of the laws of nation states (and the company).<sup>45</sup> Teubner seeks, in the instruments of CSR, a 'heterarchy of diverse legal discourses,' which install sites of political reflection in the spontaneous spheres of the economy.<sup>46</sup> CSR works, in this context, by bringing external 'learning pressures' together with internal decision-making, or discovery, processes in corporate organisations. Learning pressure creates 'irritations of the focal system,' which prompt reflexivity and translation into the logic specific to the relevant sub-system, so that, 'ultimately the external and internal programmes play out together along the desired course.'<sup>47</sup> Global law does this, and crucially, by sustaining legible commitments to the sub-systems' underlying conditions for learning – in this case, the maxim '*profitability within the law*' – and innovations in the balance achieved between 'soft' and 'hard' law.<sup>48</sup> CSR performs as 'law,' for Teubner, when external impulses condition profitability by subjecting 'to an additional test decisions that have already been subjected to the binary legal/illegal code.'<sup>49</sup> The next parts of the article will review in more detail the meaning and impact of CSR's regulatory propagation, beyond the state, paying careful attention to the relevant cognitive opening(s) created by 'profitability within the law' in the case of CSR.

#### *CORPORATE SOCIAL RESPONSIBILITY: A SITE FOR LEARNING ABOUT 'THE SOCIAL'*

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<sup>43</sup> Department for Business Innovation & Skills (BIS), *A Long-Term Focus for Corporate Britain: A call for evidence* (2010) at 7.

<sup>44</sup> Teubner, op. cit. (2012), n9, p. 116.

<sup>45</sup> Teubner, op. cit., n25 and see too, G. Teubner, 'Hybrid Laws: constitutionalising private governance networks,' in *Legality and Community*, eds. R. Kagan and K. Winston (2002) 311-333.

<sup>46</sup> Teubner, op cit. (2012), n9, at p.119; Teubner, op. cit. (2002), n45 and Teubner, op. cit. (1997), n25.

<sup>47</sup> Teubner (2012) Id, p. 87.

<sup>48</sup> Parkinson, op. cit., n16, p. 260 – the 'ideal' rule for corporate conduct. Teubner, op. cit., n25 on hard and soft law.

<sup>49</sup> Teubner, op. cit. (2012), p. 110.

What kinds of lessons are companies invited to learn in CSR? How does 'the social question' arise in a market economy animated by principles of self-regulation and the efficiencies of calculative behaviour? Important questions arise, here, concerning the nature and kind of the wider interests, which serve as the subjects of CSR practices. How is it that some interests 'jut out,' to compel special attention as per the course of CSR, rather than find a less visible end via economic rationalities? Characteristic of the wider interests, which rise up for consideration in the practice of CSR, is that they are distinguishable in composition or kind from wholly *economic* considerations. CSR gathers knowledge about the value of the (many) social, cultural, moral, community and environmental interests, which are impacted upon by global entrepreneurial activities. It finds voice for social and material relationships that display logics not wholly consumed by gain and/or self-interest – hence the materialisation in acts and instruments apart from calculation – and to which advocates attach value. The European Commission says, 'CSR offers a set of values on which to build a more cohesive society and on which to base the transition to a sustainable economic system.'<sup>50</sup> Providing a list of non-economic factors that CSR 'at least' covers, the Commission includes, in the subjects of CSR, human rights, labour and employment interests, environmental issues, the need to combat bribery and corruption, tax justice, indigenous rights, as well as equality and supplier relationships.<sup>51</sup> The European Parliament, similarly, note 'Europe's own "social license" to pursue trade-led growth,' and a 'new "compact" with civil society as defining features of CSR.'<sup>52</sup> The European Institutions detail, across their recent publications on CSR, a *social foundation* without the protective engagement of which gain and growth are reduced in their long-term viability.

The article retrieves an interesting admission from this rationalisation of CSR, as a mechanism for capturing 'the social' foundation to economic activity. It unlocks the possibility, often buried in the CSR literature, that markets do not account for the social dimensions of economic activity undirected – or more 'spontaneously,' as Friedrich Hayek might say.<sup>53</sup> The very existence and institutionalisation of CSR – for example in the 2006 Act – points to dissatisfaction with how companies have accounted for social and environmental factors thus far. 'Many who have been saying for years that markets are best when left completely alone have been recently proven wrong,' said Gunther Verheugen, once European

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<sup>50</sup> European Commission, op. cit., n28, p.3

<sup>51</sup> id. p.7

<sup>52</sup> European Parliament Resolution on Corporate Social Responsibility: promoting society's interests and a route to sustainable and inclusive recovery' 2012/2097 (INI) at paragraph 17 and 'Explanatory Statement'; see too, European Commission, *Green Paper: The EU corporate governance framework* (2011) on 'wider' matters from 1, noting the longer term at 3, on short-termism at 11-12.

<sup>53</sup> F. Hayek, *Law, Legislation and Liberty: Volumes 1-3* (1982).

Commissioner for Enterprise and Industry; 'rebuilding trust, managing the human dimension and seeing sustainability as an opportunity for new business are key to overcoming the economic crisis.'<sup>54</sup> This social, or 'human' (to use the words of Verheugen), dimension to economic behaviour rests at the heart of CSR's call for responsibility, and the many (soft-law) interventions concerning non-economic value that make up the instruments of CSR. Social relations integral to the functionality of economy become, with this, factors that require 'intervention' in order to guard against the material threats that can flow from the economic rationalities. They require more voice, and more weight, in order to *bear sufficiently* upon corporate cognition and calculative behaviours, the growth of CSR suggests. Governments and international organisations, seeking recovery from (even sustained) instances of social blindness and/or irresponsibility in the market, have commonly worked to 'strengthen CSR' in precisely these terms.<sup>55</sup>

This view of CSR notably invites the consideration of Karl Polanyi, a theorist prescient on the incapacity of market economies to defend society and environment to an acceptable level. The rise of CSR, and the suggestion, elaborated above, that markets left to their-own devices displace a 'human' quality to economic behaviour, invokes Polanyi's vocal criticism of the self-regulating market. Polanyi writes, in his classic, *The Great Transformation*, about how the market economy directed by self-interest creates great perils for society and environment. 'Such an institution', he says, 'could not exist for any length of time without annihilating the human and natural substance of society.'<sup>56</sup> Polanyi assigns the production of social dislocation to what he calls the 'disembedded economy:' an economic system that is regulated, controlled and directed by market prices, and nothing else. His book links this to the rise of nineteenth century economic liberalism and the development of the institutions of laissez-faire – composing of a competitive labour market, automatic gold standard and international free trade – before the collapse of that same (nineteenth century) civilisation in the early twentieth century.<sup>57</sup> Polanyi, in his assessment of this latter crisis, identifies the particular vulnerability of society and environment to the accelerated pace of exchange-relations in the market economy. 'The elements of industry had to be on sale,' he says of the (for him) 'fictitious commodities' – land, labour and money – in order for the economic sphere to fulfill a promise of self-regulation and ensure the availability of social resources for industrial scale production. But, this incorporation of the 'moral entity, "man", and 'nature,' Polanyi goes on to argue, forces their adaptation to the demands of a universal price mechanism at a 'rate of change' too fast for the preservation of social purposes. Dislocation and degradation of the social and material elements arise

<sup>54</sup> G. Verheugen, 'Corporate Social Responsibility Essential for Public Trust in Business' SPEECH/09/53 (2009) at 3.

<sup>55</sup> id. European Parliament, op. cit., n28, at paragraph 2 on CSR and the 2008 crisis.

<sup>56</sup> Polanyi, op. cit., n6, p.3.

<sup>57</sup> J. Maucourant & S. Plociniczak, 'The Institution, the Economy and the Market: Karl Polanyi's Institutional Thought for Economists' (2013) 25 *R. of Political Economy* 512-531.

within the market system, for him, because of this.<sup>58</sup>

Polanyi contrasts this depiction of the liberal market economy, disembedded from the social integument, to what he calls the 'embedded' economy. The embedded economy concerns an economic system submerged in general social relations, so that 'limiting factors,' which could bear upon material distribution, effect an influence 'from all points in the sociological compass.'<sup>59</sup> It situates economic life within wider interplays of social, legal and political institutions, which ensure that productive activity is 'disciplined by general principles of behaviour.'<sup>60</sup> Polanyi, as contemporary scholars have pointed out, broadly identifies the reality of the embedded economy as preceding the liberal market economy and British industrial revolution.<sup>61</sup> Polanyi points to a history of military, political, legal and customary management in pre- and non-capitalist economies, including the mercantile era, as evidence of a historical rupture between the social and political circumstances of the embedded and disembedded economies. However, as well as identify 'classic' examples of the embedded economy, Polanyi also, 'glimpses', as Fred Block says, social embodiments that retain a significant place and purpose in the market economy.<sup>62</sup> Powerfully, such a 'glimpse' arises in Polanyi's identification of the constitutive work carried out by law and state institutions engaged by the creation and maintenance of the self-regulating market. 'Laissez-faire was planned,' he says, and, 'Our thesis is that the idea of a self-regulating market implied a stark utopia.'<sup>63</sup> Polanyi 'glimpses,' again, the socially embroiled economy in his thesis concerning 'the double-movement.' The economic liberals' movements born of 'hope – the vision of perfectibility' and 'a blind faith in spontaneous progress,' which concern the progress of marketisation post 1830s, institute a 'deep-seated' counter-movement, which moves for 'conservation of man and nature as well as productive organisation.' This counter-movement relates 'to the broad range of vital social interests affected by the expanding market mechanism,' and which move spontaneously for the

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<sup>58</sup> Polanyi, op. cit., n6, pp. 71-80.

<sup>59</sup> id. 64.

<sup>60</sup> id. 57.

<sup>61</sup> Zelizer, op. cit., n10; F. Block, 'Karl Polanyi and the writing of the great transformation' (2003) 32 *Theory and Society* 275-306; C. Holmes, 'A post-Polanyian political economy for our times' (2014) 43 *Economy and Society* 525-540; M. Watson, 'The Great Transformation and Progressive Possibilities: The Political Limits of Polanyi's Marxian History of Economic Ideas' (2014) 43 *Economy and Society* 603-625

<sup>62</sup> Block, id. p.276.

<sup>63</sup> Polanyi, op. cit., n6, p.141 and 10. On the debate regarding whether the institutions of laissez faire constitute 'embedding': Block, op. cit., n61, p. 296 and C. Machado, 'Karl Polanyi and the new economic sociology: notes on the concept of (dis)embeddedness' (2011) RCCS Annual Rev. 3.

limitation of market forces.<sup>64</sup> This counter-movement iterates as a *legal act or* communication, as Marc Amstutz says, where dispersed and unplanned reactions and counter-forces register as (primarily) legislative outcomes.<sup>65</sup>

It is a comparable 'glimpse' of this social traction, which protrudes in the contemporary movement for CSR. The external arousal of grass-roots forces *for the social*, which animates the rise of CSR, rebels against the prospect of the fully 'disembedded' economy or corporate actor.<sup>66</sup> Polanyian counter-forces to the 'neoliberal' corporate constitutionalisation stir and surface in the social claims that make up CSR. CSR participants carry knowledge about the variety and extent of perils experienced by wider interests, struggling against the weight and dogma of commercial forces. They contest corporate 'collisions' with important societal agendas, and draw attention to relatable depletions in the reproductive conditions of the wider interests, or (Polanyi) 'the fictitious commodities.' CSR gathers counter-forces that might be broadly characterised as concerning these 'fictitious commodities,' where they intimate 'precarity (for labour), indebtedness (for money) and dispossession (for nature and knowledge).'<sup>67</sup> The forums and instruments of CSR present sites for gathering dispersed social insight together, to produce coherent activism, mobilisation, lobbying, and normative instruments. *Legal* communication and development arises, out of this, in the development of soft-law instruments, guidance and transparency initiatives, which intimate social principles and generate internal corporate commitments and self-restriction. This constructive view of CSR brings together the widest variety of social and market participants – NGOS, civil society actors, consumers and investors, governments and international organisations. The work that they undertake depends on iteration, influence and learning pressure, as per projections of new governance. 'Voluntarism' is qualified, thus, by the communicative development of learning pressures.<sup>68</sup>

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<sup>64</sup> Polanyi, op. cit., n6, pp. 84, 76, 132, 145.

<sup>65</sup> Amstutz, op. cit., n9, p.362. Polanyi on legislative outcomes, op. cit., n6, p.132.

<sup>66</sup> Dale, op. cit., n8, p. 222 - distinguishing protective movements 'from above' and resistance 'from below' (noting the latter as 'not essential' in Polanyi); Burawoy, op. cit., n2, noting the importance of social movements, particularly where the state is repressive or not available for collective action. CSR, as narrated above, engages both spheres.

<sup>67</sup> Burawoy, op. cit., n2, p.28, linking Polanyi to contemporary strains and describing 'knowledge' as the fourth 'fictitious commodity.' See B. Jessop, 'Knowledge as a fictitious commodity: Insights and limits of a Polanyian perspective,' in *Reading Karl Polanyi for the Twenty-first Century*, eds. A. Buğra and K. Ağartan (2007) 115-134.

<sup>68</sup> McBarnet, op. cit., n18, ch 1; Teubner, op. cit. 2012, n9, p.96; Teubner, op. cit. 2011, n9, internal commitments generating 'hard law' out of (public) 'soft-law' at the level of corporate commitment (the drafting and implementation of private codes).

'CSR as law' works on a cognitive level, in this way, to encourage companies to self-limit and conduct themselves in a manner that is 'adequate to their social environment.'<sup>69</sup> Importantly, this finding *for the economy immersed in*, and constituted by, general social relations does not necessarily deplete the relevance of Polanyi's political (or 'polemic') intimations regarding the rise of modern-day capitalism as a utopian and disembedded economy.<sup>70</sup> Rather, the analysis of marketisation carried out in this article suggests the usefulness of reading the two projections of 'embedding' and 'disembedding' together.<sup>71</sup> The simultaneous reading has a compelling place in contemporary Polanyian scholarship, intimating (either) as an explanation for instability and crisis, or as a dynamic by which (individual or systemic) cognition might be adapted to the economic mindset – the 'stark utopia' for Polanyi.<sup>72</sup> Such a mindset might work at the level of influencing governance structures and regulatory ambitions ('embedding law in the economic sciences'), shaping or 'performing' realities.<sup>73</sup> Alternatively, 'disembedding' might capture the 'empirically acquired primacy of the economy,' which 'becomes autonomous from all (conscious) social control.'<sup>74</sup> Such a characterisation is probed by actions, in the market, that seek to work through the 'embeddedness' of economic phenomena by reverting to further acts of market framing and social abstraction. A compelling issue for analysis, which both possibilities open onto, concerns the status of counter-forces that 'return' after marketisation and which are thrown into this situation of simultaneity – on what axis do counter-forces travel when law is, itself, embedded within economic cognition or rationalities? Or, how do they handle the risk or prospect of further abstraction, when it is the site from which they have already returned?

A simultaneous reading of embedding and disembedding is important for the recovery of this article's central thesis. It concerns a corporate governance paradigm focused on corporate autonomy, economic performance and the stability of financial institutions, *which encounters, in the rise of CSR, its own social*

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<sup>69</sup> Amstutz, op. cit., n9, p. 388.

<sup>70</sup> Block, Watson and Holmes, op. cit., n61; Dale, op. cit., n8, pp.188-206; P. Steiner, 'Who is right about the modern economy: Polanyi, Zelizer, or both?' (2009) 38 *Theory and Society* 97-110 at p. 98.

<sup>71</sup> G. Krippner, 'The Elusive Market: Embeddedness and the Paradigm of Economic Sociology' (2001) 30 *Theory and Society* 775-810, at 781 identifying problems in separating the two spheres of enquiry and casting the line by which Polanyi's work is understood as operating at 'several different levels simultaneously.'

<sup>72</sup> Block, op. cit., n61 (instability and crisis); Machado, op. cit., n63; Dale, op. cit., n9, p.199; Holmes, op. cit., n61, p.537.

<sup>73</sup> S. Frerichs, 'Re-embedding neoliberal constitutionalism: a Polanyian case for the economic sociology of law' in *Karl Polanyi, Globalisation and the potential of law in transnational markets*, eds. C. Joerges and J. Falke (2011) 65-85, at 81; Holmes, op. cit., n6.1

<sup>74</sup> Machado, op. cit., n63.



*traction and source of embodiment.* CSR combines social movements for the recognition of the wider interests, on an unprecedented scale, with movements for market building and social abstraction that define corporate cognition. A wave for social recognition arises, in the first place, along the axis of the Polanyian counter-movement, as a reaction to social problems relatable to marketisation. But, it quickly encounters something like a sweeping move – a disembedding from the social edifice – in the recovery that is instituted by the company defined, at a higher level of being, by the projects of market building and integration. The result defines, and renders distinctive, twenty first-century-market economy as marked by deepening *splits and (often) invisible fractures* in the social that returns after marketisation (indicated by the rise of CSR). The social, which is thrown between simultaneous moves for embedding and disembedding, experiences containment and fracture in consequent acts of abstraction. The problem with this is the opportunity that it creates for corporations to *extend – or void – the market's social and material limits*. The final (now approaching) parts of the article will explore this claim, concerning the fate of 'the social' among the projections of disembedding, in more detail.

#### *CORPORATE SOCIAL RESPONSIBILITY: CONTAINING 'THE SOCIAL'*

Polanyi's double-movement is rich in the resources that it provides for critical theory and (also) for the imagination of social actors concerned about socialising or 'embedding' the market. Opportunities to win protection from the progress of competitive forces, or to amend the institutional structures of capital and the production process, are presented, in his theory, wherever strain in the social body materialises.<sup>75</sup> The endeavour to build an association between the 'rise of the social in CSR' and Polanyi's counter-movement seeks to avail itself of comparable constructive and protective opportunities. The association seeks out 'ideological openings' (Block) in the systems for corporate governance, on this occasion; social forces are imagined to get to work in the relevant openings, influencing directors' choices and bearing upon reflexive processes.<sup>76</sup> In the cognitive interaction, which ensues, the company intimates as a modern-day 'laboratory' for the double-movement and 'embeddedness.'<sup>77</sup> Constitutive elements touched and mobilised into action by the company's market participation find the animation to rise up against inequality, exclusion and dispossession. Regulatory and governance activities, which the wider interests undertake, create nodes in the social in relation to which the committed company might become 'embedded.' The juncture between marketisation and protection, at

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<sup>75</sup> F. Block, 'Polanyi's Double Movement and the Reconstruction of Critical Theory' (2008) 38 *Revue Interventions économiques* <<http://interventionseconomiques.revues.org/274>>.

<sup>76</sup> *id.*, pp. 6-7 identifying the concept of 'ideological openings.'

<sup>77</sup> P. Zumbansen, 'The Evolution of the Corporation: Organization, Finance, Knowledge and Corporate Social Responsibility' (2009) *Comparative Research in Law & Political Economy* (Research paper 6/2009) 1-40 at 22.

which this return and social traction protrudes, captures the emergence of a *movement for intervention, social protection and development, as well as the limitation of economic forces* – to ‘blunt’ ‘restrict’, ‘protect’ or ‘resist.’<sup>78</sup> CSR draws ‘social’ knowledge together in a language *apart* from the economic rationalities, in legal-political mobilisations and instruments.

It helps, at this juncture, to return to Teubner, whose theories on civil constitutions depict the company’s cognitive adaptation to its environment as a specifically legal act. A legal perspective on the encounter that occurs in CSR, between the simultaneous movements for marketisation and social protection, is important in order to assess the ‘regulatory’ force achieved by participants. Teubner sets out the key terrain by identifying, in the fields of new governance, the potential for constitutionalisation and the creation of new hierarchies between ‘ordinary’ law and a ‘law of laws.’<sup>79</sup> Transnational developments, which concern the corporation and its social responsibilities, exert (for him) a constitutional influence over the economic and legal observations of the company, subjecting ‘to an additional test decisions that have already been subjected to the binary legal/illegal code.’<sup>80</sup> Reflection on the instruments of CSR sends the company directors in ‘new’ – transnational, normative, public policy – directions. This reflexivity seeks to create worlds of meaning distinct from the usual flow of business transactions, and protrudes as a vitally ‘legal act.’<sup>81</sup> The directors remain within the range of responses afforded by the corporate form and its own systems for learning – ‘profitability within the law’ – the ‘code’ probing new distinctions between licit and illicit, which grow out of the ‘exigencies’ of global economic transactions.<sup>82</sup> Preservation of the company’s self-understanding is important to avoid the corrosive effects of a ‘clash’ in competing systems or rationalities (law, economy).<sup>83</sup> Stability is produced via a ‘structural coupling’ between social norms and economic processes to permit flexibility and adaptation to changing circumstances. Discipline concerns acts of ‘repoliticisation’ that comment on and adjudicate outcomes (or juridifications), and which rebound perceptions from the social periphery in the generation of (further) impulses.

A reading of embedding and disembedding, which sees the two moves as occurring simultaneously,

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<sup>78</sup> Terms employed by Polanyi, op. cit., n6.

<sup>79</sup> Teubner, op. cit. (2012), at 110, see also pp. 111-113.

<sup>80</sup> id., p.110.

<sup>81</sup> id., p. 111.

<sup>82</sup> Teubner, op. cit., n25, p.14.

<sup>83</sup> G. Teubner, ‘Juridification: concepts, aspects, limits, solutions’ in *Juridification of Social spheres: a comparative analysis of the areas of labour, corporate anti-trust and social welfare law*, ed. G. Teubner (1987) 3-48; Parkinson, op. cit., n16, pp. 317-333; Scott, op. cit., n5.

problematizes this compelling view of social regulation. CSR begins with the immense and creative energies 'of those most immediately affected by the deleterious action of the market.'<sup>84</sup> It collects information on the social perils experienced by wider constituents and, using soft-law, communicates this information to the company. By encouraging reflection on this information, CSR sees itself as drawing the attention of company directors *outwards*, towards a better cognition of social principles and interests affected. However, this glance outwards is cut short, for the present author, by a simultaneous 'sweeping move' – the disembedding from the social edifice – which accompanies the power and presence of wider market building projects. Projects are wider in the sense that their animation extends well beyond company law, to concern the constitutionalisation of market disciplines and their expanded reign over the breadth of social organisation, 'both outside and inside the state.'<sup>85</sup> Presence arises within company law, and affects civil constitutions, in the cognitive openings (described above) that leave market disciplines 'in charge' of the corporate governance process. The result is a double internalisation of the counter-forces and constitutional impulses, which are unleashed by marketisation. First, social forces and communications undergo internalisation and 'translation' in the journey to commitment (the re-entry of law into corporate organisation) – a process that Teubner describes as 'circuitous,' but in which consumer and investor powers are likely to be 'decisive.'<sup>86</sup> Second, repoliticisation of outcomes takes place after critical stages in the juridification of economic relations have already been reached, making it harder for 'CSR as law' to really know itself (the re-entry of economy in law).<sup>87</sup> This double internalisation occurs where rationalising principles of the self-regulating market, namely gain and the commodity fiction, are *functionally and symbolically* preserved for their effectiveness in the institutions of CSR. In fact, the opportunity to turn external social problems into internal political issues for the enterprise, which defines CSR, grows the domain of their application.<sup>88</sup>

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<sup>84</sup> Polanyi, op. cit., n6, p. 138.

<sup>85</sup> S. Gill, 'Globalisation, market civilization and disciplinary neoliberalism,' 24 *Millennium: Journal of International Studies* (1995) 399 at 400, on new constitutionalism and Polanyi at 412-425; D. Schneiderman, *constitutionalising Economic Globalisation* (2005).

<sup>86</sup> Teubner, op. cit. (2011), n9, p.638; that which is 'banished' to the environment of the company *then* requires internalisation by the company in order to generate commitments. On the 'banishment' of actors 'internal' to companies, namely workers' organisations (leaving the 'agency' view of the company intact), R. Dukes, 'A Global Labour constitution?' (2014) 65 *Northern Ireland Legal Quarterly*, 283.

<sup>87</sup> Teubner, id., p.628.

<sup>88</sup> Caporale Madi and Goncalves, op. cit., n9, p. 250 observing (CSR) strategies in the Brazilian banking sector for low income populations as 'expanding commodification and indebtedness,' as well as growing market-survival

CSR is, as such, a site where the two arms of Polanyi's double movement – the principle of economic liberalism, the principle of social protection – begin to show signs of their *containment* within companies and markets. Witness of the socially perilous forces generated by markets is fractured and contained by corporate commitment – that which falls outwith the system's binary (or even meta) code fails cognition on any one cycle of claims. The protective movement is also contained within the broader market. A general flow of market transactions and information releases concerning the wider relationships is commented on, responded and (also) *added to by (multiple, other) companies in the practice of CSR*. This 'double' containment is interesting where it works against the prospect of a *simple* collapse of the firm/market distinction, whereby the price mechanism is in some part superceded within the firm and the direction of an 'entrepreneur-coordinator' appears.<sup>89</sup> Social capacity within the organisational form, which might operate in some measure distant to market disciplines – for example, in the demand (section 172) that the company look to the 'long-term' when promoting the interests of the members – remains a legible starting point for social influence.<sup>90</sup> Notably, though, the meaning or availability of this capacity and separation from markets still depends on, and relates to, a wider interface with market and financial disciplines. It is at this intersection that the social becomes doubly and acutely contained. It is contained within the company by the *internal* relationship between company and investor, which defines the company's mode of action – the 'complete' narrative of its programmatic coding. The company's organisational capacity contains *within itself* structures for market building and earnings growth, including the pricing of social and environmental risk as an essential feature of economic performance. It is contained, too, by external market disciplines and the power of finance, the 'economic grand narrative,' capable of contracting social and temporal space, as well as homogenising organisational capacity.<sup>91</sup>

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strategies and transforming individual behaviour ('dismantling' traditions and inter-relations based on reciprocity / redistribution).

<sup>89</sup> R. Coasce, 'The Nature of the Firm,' in *The Economic Nature of the Firm*, R. Kroszner and L. Putterman (2009, 3<sup>rd</sup> edn.) at 81.

<sup>90</sup> J. Parkinson, 'The Legal Context of Corporate Social Responsibility' (1994) 3 *Business Ethics* 16-22 at 19-20 on the discretion that Parkinson anticipates might be afforded management by the courts in the UK to take socially responsible action, even within a shareholder-led paradigm; Ireland, *op. cit.*, n30, intimating the activation of such a space, under the cover of Bretton Woods, for CSR in the post-war era.

<sup>91</sup> Ireland, *op. cit.*, n30, who observes the two containments across different financial eras, e.g. before and after and Keynesianism, but in his project for 'reform' seems to agree with the suggestion of their coming together; M. Moore and E. Walker-Arnott, 'A fresh look at stock market short-termism' (2014) 41 *Journal of Law and Society* 416-45.

Containment contrasts with Polanyi's delineation of a basic trajectory for social protection in *The Great Transformation*, where he describes how the 'strains' caused by market behaviour can 'shift' between the economy and *other social spheres*. 'Whatever the market in question – labour, land, money,' he says, 'the strain would *transcend* the economic zone and the balance would have to be restored by *political means*' (emphases added).<sup>92</sup> By noting this prospect of mobility and/or *political* securitisation, Polanyi's double-movement presents as a source of *valuable knowledge about the limit points in social tolerance to market forces*. Testimony arises and is secured, in his theory, because the social limits communicated by the counter-movement reach in some way outwards, to register in non-economic (social, legal, political) domains. The internalisation of social energies in CSR dissipates this possibility. In CSR, the lessons to be learned by the corporation are *simultaneously indexed and classified* by the economic rationalities, the foundations of which concern economic interests. This economic indexing occurs even if social influences, or 'constitutional codes', do take company policy in a 'transnational' or 'public policy direction.' The commodity form extends, nevertheless, due to the longer-term capacity of the economic system and its innermost actors, the corporations, to *rationalise and explain to themselves the meaning and value of constituents touched by practices of CSR*. The development of new 'markets' in responsibility, rigorous in their employment of measurements and metrics concerning the 'creation' of value, confirms precisely this proximity and fluidity in the narration of (even) legal acts. This (internal) proximity, to gain, is problematic because it produces an economic order able to obscure clear sight of *the limits* to economic rationalities. CSR's insistence on corporate 'learning' and 'integration' means that nothing *ever really leaves or transcends* the market in CSR. The 'bottom' (Teubner) that is meant to be the 'end point' at which social understanding is 'lucid enough' to allow for responsabilisation, or a change in course, never actually fully obtrudes.<sup>93</sup> Instead, breakpoints to the commodity fiction are persistently submerged and displaced by the promise of a future integration with gain, and by continuing efforts to restore 'public trust' in business.<sup>94</sup> The notion of 'limits' becomes non-sensible because the cognition of problems only ever arises *within the calculative apparatus* at a point when social abstraction (in crisis management) has already engaged.

The containment, which results, is challenging for the multitude of wider interests engaged by CSR, and seeking to produce effective civil society governance mechanisms. Civic constituents find that the market spaces into which they are thrown by the availability of CSR defuses visceral protective claims. The promise of market integration crops off systemic injustices. It represses the possibility, highlighted

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<sup>92</sup> Polanyi, op. cit., n6, 227.

<sup>93</sup> Teubner, op. cit. (2012), n9, p.83.

<sup>94</sup> European Commission, op. cit., n28, at 4.1; Verheugen, op. cit., n56; European Parliament, op. cit., n28 and n52

by Polanyi, that intense marketisation may structurally imperil and recycle certain strains – a possibility that, if acknowledged, would render permanent and yet, defunct the whole CSR project. Most ironically, civic participants, in CSR, must struggle to distinguish protective claims from the responsiveness of corporations. This struggle occurs where the social interaction, which is hosted by CSR, is drawn across the market, to be animated – or abstracted – as exchange-relations. Claimants engaged by the movement for social protection become interchangeable, in the abstraction, with corporate respondents receiving and responding to news of social harms. This switch occurs where claims communicated by the wider interests open onto definition from both sides of the communication in exchange-relations. The company's answer or reflexivity in the narrative report, say, *contains within it the power to define the terms and content of underlying protective claims*. This 'flatness,' as the article terms radical openness and fluidity in exchange dynamics, not to mention power inequalities, significantly affects the ability of non-economic stakeholders to *impose* social learning on the company in the terms imagined by 'CSR as law.'<sup>95</sup> Internal and external mechanisms for simultaneous *liquidation* of social principles and reflection imply the presence of a *contrary power to present adequacy to representatives of the wider interests*. This contrary power underwrites the phenomenon of 'greenwash,' and a more exhausting version of the social 'return.'<sup>96</sup> It underlies problematic ruptures that commonly materialise between the particularity of social claims and the generality of, or displacements within, corporate responsiveness.

The problem with CSR is that it proposes to use the social influence, which is generated at the juncture between marketisation and social protection, to justify attempts to *internally resolve* the proliferation of (unevenly distributed) social fractures engaged by the progress of marketisation. The determination to protect, which is viscerally present in CSR, is spent on restoring self-regulation and corporate autonomy, insofar as the two can be institutionalised towards the certainty associated with the 'agency' view of company and investor relations. In Polanyian terms, this internalisation concerns, in a unique way, the phenomenon of what he called 'self-regulation impaired' – a secondary dynamic, for him, which concerns 'disruptive strains in the social' and the tendency of reactive state actors to impair market self-regulation in their programmes of social intervention.<sup>97</sup> This phenomenon is rich in its presentations for analysis – as a clash between the gravitational pulls of 'embedding' and 'dis-embedding' at ideational, spatial and/or temporal levels, and as the precursor to social crisis before 're-embedding' (post-war 'embedded liberalism').<sup>98</sup> However, today's *constitutionalisation* of the problem is distinct, in every way,

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<sup>95</sup> A. Supiot, 'A legal perspective on the economic crisis of 2008,' (2010) 149 *International Labour Rev.* 151–162.

<sup>96</sup> H. Rogers, *Green Gone Wrong: Dispatches from the frontlines of eco-capitalism* (2013).

<sup>97</sup> Polanyi, op. cit., pp. 201-222.

<sup>98</sup> Dale, op. cit., n8, pp. 62-70; Machado, op. cit., n63; Block op. cit., n61, pp. 297-8. On 'embedded liberalism,' John

from Polanyi's analysis, where self-regulation impaired presented (for him) as (only) one contingent product of a fundamental conflict in techniques and ideas, social and economic forces. By contrast, self-regulation impaired in the twenty-first century has become *the all-consuming problem* for government and governance of the economy. Its dangerously limited curiosity filters through and protrudes in most (if not all) regulatory and public policy dilemmas (including CSR).<sup>99</sup> The social system that comes to be marshaled by the co-ordinates of self-regulation impaired, in this way, experiences the rise of a starker utopia in markets that become 'powerful social constructions equipped with scientific authority.'<sup>100</sup> The confinement of the social question and effective exercise in de-sociologisation obscures and contracts *full view* of the *constitutive web* – concerning law, institutions, society, culture, politics, morality and also materiality – that *conditions* economic life.<sup>101</sup> It cuts out *important lines* to the 'meta-stuff' of embedding.

CSR subverts Polanyi's central problem of how to 'embed' the economic system in society and its legal and political institutions, or check expansionist tendencies. It does so by working *to adapt society, and society's diverse knowledge and governance systems to the demands of an economy disembedding*. CSR accelerates 'running society as an adjunct to the market,' by tethering claims for social protection and better governance to market strategies for product entry and competitiveness (the business case for CSR).<sup>102</sup> CSR unwinds the ability of the social relationships to really *weigh upon and regulate, the forces for marketisation*, in the way that a legal field promises. Key in this is the claim that the problem of CSR, as comes to be defined in this article, is different from the 'usual' charge levied against an ever-expanding commodification of the lifeworld – the charge of 'generalised corruption' in respect of social, ecological and moral values commoditised. The problem with 'CSR as law' for this article is distinct. It concerns lurking and *generalised uncertainty that the concept and practice creates about the treatment of social and environmental relationships in market economy, which attends the fading of normative and social boundaries in the corporation's networks for new governance*. Social claims, which arise on the

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Gerard Ruggie 'International regimes, transactions, and change: embedded liberalism in the postwar economic order' (1982) 36 *International Organization* 379-415.

<sup>99</sup> Gill, op. cit., n85, 'whilst preserving social protection for the strong' at 407; G. Krippner, *Capitalizing on Crisis: the political origins of the rise of finance* (2004); M. Bartl, 'Internal market rationality, private law and the direction of the Union: resuscitating the market as the object of the political' (2015) *European Law Journal*, doi 10.1111/ eulj.12122.

<sup>100</sup> Frerichs, op. cit., n73, at 78, 'a powerful social construction equipped with scientific authority.' See, too, A. Supiot *The Spirit of Philadelphia* (2012).

<sup>101</sup> E. Christodoulidis, 'The European Court of Justice and "Total Market" Thinking,' (2013) 14 *German Law Journal* <<http://www.germanlawjournal.com/index.php?pageID=11&artID=1589>>; Palpacuer, op. cit., n14, on the historical, political and institutional specificity of counter-powers.

<sup>102</sup> Polanyi, op. cit., n6, p. 60.

wave of counter-forces and defend a different vision of the world to business actors, come to be buried within the general patterns of market behaviour. They buckle in among the very mass of social impacts with which participants, in CSR, seek to grapple. The decisive 'social' or 'legal' act fails to obtain, in this context, because it is *the social that splinters, over and over again*, and not reflexivity (or the market project). This splintering denotes not 'fragmentation' – of nations, regimes and cultures – but an assumed coding in relation to which the containment and fracture of this very pluralism occurs.<sup>103</sup> This 'splintering' also condemns the wider interests to only ever more 'painstaking' enquiry, and more inward assessment, in order to disentangle the social from the economic – a seemingly nostalgic act but a *necessary one* in any attempt to *confirm the adequacy of corporate responsiveness* and address deeper questions of accountability. A contrary prospect of darker social shadows considerably depletes the worth of the responsibility that is executed within CSR.

#### ON THE PROBLEM OF CSR, SOME BRIEF CONCLUSIONS

This article produces two analyses of CSR using Polanyi. The first uses Polanyi's contrast between the embedded and disembedded economy to outline the pattern of abstraction to which the social responds in CSR. The second employs Polanyi's idea of the double-movement to observe the capacity for social regulation or limitation in CSR, testing the claims of new governance. The critical findings of the article are three-fold. The first finding concerns the characterisation of regulatory networks in relation to CSR. The article argues that this network executes, at an interpretative and cognitive level, the primacy of the company's economic interests. In CSR, the social question still potentially arises in the dynamics of the counter-movement to communicate social boundaries experienced in relation to marketisation. But, wider interests quickly find that the cognitive structures for responsiveness, which define CSR from a company's perspective, offer no fundamental release from economism and market making. The social is forced into what the article calls 'a split': some undetermined part goes forward for market treatment and responsiveness, whilst another (even more undetermined) part of the social body is swept away, often without trace or acknowledgement. Like the N.I.N.J.A, from the article's introduction, who retreats and shrinks and becomes shadow after an initially intense flow of responsiveness, the problem of CSR is defined by lurking and generalised uncertainty regarding the *adequacy* of social treatment generated by the practice of CSR. Repoliticisation is problematic, where it takes place among simultaneous moves for embedding and disembedding, which inculcate an always darker and more persistent social shadow.

In a world full of networks and flux and constant deterritorialisation, it might seem somehow passé, or naïve, to be concerned about the social in terms of a prospect of disentanglement. But why, then, carry

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<sup>103</sup> Distinguishing Teubner, op. cit. (2012), n9 and the 'double fragmentation of world society' (p. 15).



out all the painstaking empirical research to determine regulative and limitative dimensions within the social? Why the persistent elaboration of social and environmental dimensions to economic behaviour and value creation in the many global mobilisations and instruments of CSR – why does it arise and what does it try to capture? The answer to these questions is found, in this article, in its second thesis. This second finding concerns the emergence, or acute sight, of the social question at the critical juncture between marketisation and social protection. This Polanyian site, for CSR, captures news of a limit point in social and material tolerance to marketisation and comments on potential risks to the market's 'social compact' or material foundations. Linked to this, and looking at it from a Polanyian perspective, is the additional possibility – surely difficult to dispense with unless it is at least capable of being acknowledged – that the limitation might be structural, or pertain to a deeper disjuncture between social projects and the forces for marketisation. Animated thus, the 'becoming' of CSR, or even work in the 'new economic sociology,' stand together in contesting the boundlessness of the self-regulating utopia, or 'financialised' corporation. The moves that these participants make are ones that seek out, in moves reminiscent of Polanyi on embedded economy, critical lines of social entwinement, imbroglios between law, society and economy, and planes for *weight or enquiry* that do not always defer to the smoothness of an economy that is disembedding.<sup>104</sup>

The problem with CSR is precisely that it collapses this horizon and open social ambition. A model for corporate social responsiveness that carries a power to present adequacy to the participants, or to split and bury parts of social and environmental claims, short-circuits a glance outwards and language apart. It shades the site at which CSR arises – the Polanyian juncture between marketisation and protection – and, admitting the cognitive priority of market acts, reverts to a kind of boundlessness.<sup>105</sup> *The deficit in market understanding*, which results, is adroitly apparent in law. CSR muddies knowledge about the limits in social tolerance, and so, it muddies appreciation of the market's social and material constitution. Actors working in (both) the legal and economic fields, as a result, constantly lose sight of the social and environmental bodies, which return after marketisation, as they slip to and fro between moments of exclusion, unequal inclusion and tentative accommodation within markets. It is difficult, with this void secure, to meaningfully reflect on the prospects for moving beyond the problems presented by CSR – to rethink the appropriate frames for social reference in company law and markets, to transform calculative rationalities, or to review the balance to be achieved between 'soft' and 'hard' law, responsibility and accountability. Without a more fundamental challenge to the cognitive openings that support the self-

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<sup>104</sup> Burawoy, op. cit., n2, p.8 and p.29, on a sociological tradition animated and inspired by upholding the centrality of civil society 'against the over-extension of state and market.'

<sup>105</sup> Or 'scientisation,' op. cit., n100.

regulating market and 'disembedding' – and their production of an obscuring split and void in the social – *questions of legal reform can only ever be presented as distinctly enigmatic and un-pragmatic ones.*

This latter point is important when trying to find a way forward. Recovering the influence of the wider interests in an alternative direction, beyond the dominant frames for social reference in company law and markets, starts with overcoming this apparent un-pragmatism – questioning the 'reality' put before social forces – and the colossal weight of self-regulation impaired. The social forces that witness peril in marketisation need to find their way past market building CSR, to reach a plane where they can employ their vital networks of communication, political and normative development, to question the projections of disembedding. This means using the social force and movement generated at the key Polanyian site, which is discussed in this article, to make the self-regulating market and its powerful associate, the multinational corporation, more meaningful subjects of the social insight evidenced by the rise of CSR. Participants need to use their networks to create *irritation in the social and legal imagination* at a level sufficient to contest the company's infinite chance to lead the charge for its own responsibility. This is the third and summary finding of the article. Sight of the fractures in the social that arise at the site of CSR, between simultaneous movements for marketisation and protection, is an event with the power to unshackle and redefine, rather than flatten and contain, the framing of social conflicts that concern the progress of marketisation. The future in corporate responsibility begins by looking and listening to 'goings-ons' at the site of CSR anew, and perhaps with this article's findings in mind.